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Nos. 02-1215 and 02-1265

In the Supreme Court of the United States

PRODUCER COALITION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

EXXONMOBIL GAS MARKETING COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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331-P

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC) reasonably concluded that a portion of Sea Robin's pipeline system located on the Outer Continental Shelf involves the gathering of natural gas within the meaning of Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b).

2. Whether FERC was required to determine that reclassification of a portion of Sea Robin's system as non-jurisdictional furthered the public interest under Section 7(b) of the NGA, 15 U.S.C. 717f(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a)[1] is reported at 297 F.3d 1071. The orders of the Federal Energy Regulatory Commission are reported at 87 F.E.R.C. ¶ 61,384 (Pet. App. 74a-98a) and 92 F.E.R.C. ¶ 61,072 (Pet. App. 39a-73a).

[1] References to the Pet. App. are to the appendix to the petition for a writ of certiorari in No. 02-1265.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2002. The court of appeals denied rehearing on October 22, 2002. The petition for a writ of certiorari in No. 02-1215 was filed on February 19, 2003. The petition for a writ of certiorari in No. 02-1265 was filed on February 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, confers on the Federal Energy Regulatory Commission (FERC) jurisdiction to regulate certain aspects of the natural gas industry. The provisions of the NGA apply to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to," *inter alia*, "the production or gathering of natural gas." 15 U.S.C. 717(b).

The NGA gives FERC the authority to ensure that rates and charges are "just and reasonable" and to declare as unlawful any "unjust, unreasonable, unduly discriminatory, or preferential" rate or charge for or "in connection with" any "transportation or sale of natural gas" subject to FERC's jurisdiction. 15 U.S.C. 717c(a), 717d(a). The Act also requires that any natural gas company obtain a "[c]ertificate of public convenience and necessity" before constructing or operating new facilities, 15 U.S.C. 717f(c), and further bars any natural gas company from "abandon[ing] all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities," without a finding that the gas is depleted "or that

the present or future public convenience or necessity permit the abandonment," 15 U.S.C. 717f(b).

2. This case involves FERC's reclassification of a portion of a pipeline system as "gathering" facilities for natural gas within the meaning of 15 U.S.C. 717(b). Although the NGA does not define the term "gathering," this Court has stated that the terms "production and gathering" under the NGA are "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 90 (1963). Consistent with that principle, FERC has long defined the term gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957).

To differentiate jurisdictional transportation and non-jurisdictional gathering for pipelines, FERC for many years has employed two principal tests. Under the "behind-the-plant" test, facilities upstream of compressors and processing plants (*i.e.* toward the wellhead where the gas comes out of the ground) were presumptively gathering facilities, while facilities downstream of the plants (*i.e.* toward the consumer) were presumptively transportation facilities. For gas that requires no processing, FERC has also employed a "central-point-in-the–field" test under which lateral lines collecting and transporting gas from separate wells that then converge into a single large line were classified as gathering facilities, while facilities downstream of the collection point in a field were classified as transportation. Since 1983, FERC has subsumed those two tests into a "primary function" test that focuses on a number of physical factors (*e.g.*, length, diameter, and configura-

tion of a pipeline) and certain other criteria, to determine whether facilities are primarily devoted to gathering or transportation. Under that test, no one factor is determinative, nor do all factors apply in every situation. Pet. App. 3a-4a; *Sea Robin Pipeline Co.* v. *FERC*, 127 F.3d 365, 368-369 (5th Cir. 1997).

FERC developed its primary function test in the context of onshore gathering patterns. For natural gas produced on the Outer Continental Shelf (OCS), pipelines generally are configured differently. "[P]ipelines on the OCS typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation." Pet. App. 5a. "Rather, on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where '[o]nly the most rudimentary separation and dehydration operations' are conducted to the shore or a point closer to the shore, where it can be processed into 'pipeline quality' gas." *Ibid.* (quoting *EP Operating Co.* v. *FERC*, 876 F.2d 46, 47-48 (5th Cir. 1989) (citation omitted)); accord *Sea Robin*, 127 F.3d at 369-370 (noting that pipelines on the OCS "must construct large pipes to carry (often over a hundred miles away) the raw gas from offshore rigs to the shore for processing"). In response to the practical and physical differences between onshore and offshore pipeline configurations, FERC modified its primary function test for the OCS to allow for the increasing length and diameter of OCS gathering lines, *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,988 (1990), and later announced that it would "presume facilities located in deep water [over 200 feet] are primarily engaged in gathering or production." *Gas Pipeline Facilities & Servs. on the Outer Cont'l Shelf*, 74 F.E.R.C. ¶ 61,222, at 61,759 (1996).

3. Sea Robin Pipeline Company (Sea Robin) is one of numerous competing pipeline systems located on the OCS. Its system is configured roughly in the form of an inverted "Y" with the two arms reaching out into the OCS from a central point about 50 miles south of the Louisiana coast. Pet. App. 6a, 109a (map). The entire system consists of 438 miles of dual-phase pipelines, meaning that it carries a raw stream of unpurified natural gas and liquid hydrocarbons taken directly from the gas wells. *Id.* at 7a, 84a. Sea Robin's two major arms collect raw gas from 67 production platforms, or subsea taps, where Sea Robin's facilities connect to producer or other pipeline laterals, and bring it to the Vermilion 149 Station, located at the fork of the "Y". *Id.* at 85a-86a. There, the gas is compressed and sent north along a single 66-mile, 36-inch pipeline to plants near Erath, Louisiana, where it is processed into pipeline quality gas, and then sent for delivery to interstate pipelines. *Id.* at 86a-87a.

FERC's predecessor (the Federal Power Commission or FPC) originally certificated the Sea Robin system in 1969, authorizing a combined, or "bundled," sales and transportation service that included gathering services. *Sea Robin Pipeline Co.*, 41 F.P.C. 257 (1969). FERC later certificated extensions of the system farther out on the OCS. Pet. App. 84a-85a & n.26. In 1990, Sea Robin ceased its sales service, and thereafter used its OCS pipeline facilities solely to ship gas for producers and marketers for delivery to connecting interstate pipelines. *Id.* at 84a n.25.

In 1995, Sea Robin petitioned FERC to declare that its entire pipeline system serves a non-jurisdictional gathering function. FERC denied the petition and found that Sea Robin's entire system was engaged in jurisdictional transportation services. *Sea Robin Pipe-*

line Co., 71 F.E.R.C. ¶ 61,351 (1995), reh'g denied, 75 F.E.R.C. ¶ 61,332 (1999); Pet. App. 8a. The Fifth Circuit vacated FERC's order and remanded for further proceedings, holding that FERC "gave inadequate attention to the physical and operational facilities of Sea Robin in applying its primary function test." *Sea Robin*, 127 F.3d at 367. The Fifth Circuit concluded its decision by suggesting that FERC consider whether the Vermilion 149 compressor station, where Sea Robin's two major arms converge, represents the dividing line between Sea Robin's gathering and transportation functions. *Id.* at 371.

On remand from the Fifth Circuit, FERC concluded that Sea Robin's system was comprised of two distinct components: a jurisdictional transportation system from the Vermilion 149 Station to Erath, the onshore processing facility, and a non-jurisdictional gathering system upstream of the Vermilion 149 Station. Pet. App. 74a-95a. FERC reasoned that "'the totality of the circumstances' demonstrates that the primary function of the Vermilion-Erath Line is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point[, the Vermilion 149 Station,] where the gas is aggregated and compressed." *Id.* at 93a.

Commissioners Bailey and Hebert dissented, concluding that FERC should have reclassified Sea Robin's entire system as involved in non-jurisdictional gathering activity. Pet. App. 94a-98a. Commissioner Bailey expressed the view that "as a practical matter, * * * the movement of most gas across the OCS is primarily a gathering function." *Id.* at 95a. Commissioner Hebert observed that "due to the very nature of gas production on the OCS," one of the elements in the traditional

jurisdictional test—the length of the line—"'is no more than the distance between the point of production and the nearest appropriate connection with an interstate pipeline.'" *Id.* at 98a (quoting *EP Operating*, 876 F.2d at 49).

FERC affirmed its findings on rehearing. Pet. App. 39a-73a. FERC also identified 13 physical factors it considered in determining that the facilities upstream of the Vermilion Station are engaged in gathering activities. *Id.* at 58a-59a. Commissioner Hebert dissented for the reasons stated in his prior dissent. *Id.* at 73a.

Petitioners sought review of FERC's orders in the D.C. Circuit.

4. A divided panel of the D.C. Circuit denied the petitions and held that FERC acted reasonably in considering the relevant physical factors following the Fifth Circuit's remand in *Sea Robin* and by reclassifying a portion of the Sea Robin system as engaged in non-jurisdictional gathering based on those physical factors. Pet. App. 1a-27a. The court of appeals observed that "[r]easonable people may disagree as to where gathering ends and transportation begins [on Sea Robin's system]. Were we the [FERC], we might draw the line at Erath [*i.e.*, the onshore processing plant]. Others might draw it at the production platforms themselves." *Id.* at 18a. The court concluded, however, that "after considering the inherent ambiguity in the statute and the fact that '[t]he line between jurisdictional transportation and non-jurisdictional gathering is not always clear,' (as it is not clear here), [it] simply [could not] conclude that the Commission's choice of the Vermilion 149 Station as the dividing line was unreasonable, especially in light of the Fifth Cir-

cuit's decision on remand." *Ibid.* (quoting *Conoco Inc.* v. *FERC*, 90 F.3d 536, 542 (D.C. Cir. 1996)).

The court of appeals also rejected petitioners' contention that the reclassification of a portion of Sea Robin's system was subject to abandonment proceedings under Section 7(b) of the NGA, 15 U.S.C. 717f(b). The court reasoned that "Sea Robin does not seek to abandon any facilities or services. Rather, it merely seeks to be able to continue operating previously certificated facilities as gathering facilities, exempt from FERC's jurisdiction under the Natural Gas Act." Pet. App. 25a.

Judge Edwards dissented on the ground that FERC had not engaged in reasoned decision-making in reclassifying a portion of Sea Robin's system. Pet. App. 28a-38a.

5. Following FERC's order that Sea Robin file tariff sheets that separately stated its gathering rates, Pet. App. 93a, Sea Robin challenged FERC's authority to require it to file gathering rates. In response, FERC issued an order concluding that it had jurisdiction over Sea Robin's gathering rates under FERC's authority under Sections 4(a) and 5(a) of the NGA, 15 U.S.C. 717c(a), 717d(a), over charges and rates for or "*in connection with*" any regulated pipeline's transportation activities. *Sea Robin Pipeline Co.*, 94 F.E.R.C. ¶ 61,137, at 61,525 (2001). Sea Robin did not challenge that ruling, but rather, in response to petitioners' protests to Sea Robin's proposed rates, filed separate gathering rates that were the subject of an uncontested settlement agreement that included petitioners as parties. *Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 63,023, at 65,092 n.2 (2002). FERC approved that settlement on March 13, 2002, *Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 61,263, and those rates currently govern Sea Robin's gathering service on the OCS.

ARGUMENT

Following the Fifth Circuit's decision in *Sea Robin*, FERC determined that the portion of Sea Robin's system upstream of the Vermilion 149 Station is engaged in gathering of natural gas while the remaining system is engaged in transportation. FERC's conclusion rejected both petitioners' view that Sea Robin's entire system is engaged in transportation, as well Sea Robin's view before the Commission that its entire system is engaged in gathering. The court of appeals correctly held, under *Chevron U.S.A., Inc.* v. *Natural Res. Defense Council*, 467 U.S. 837 (1984), that FERC reasonably reclassified a portion of Sea Robin's system based on its consideration of the particular physical factors present in this case. That factbound decision does not conflict with any other court of appeals decision or any decision of this Court.

Nor does this case otherwise present any issue of pressing importance regarding FERC's authority to regulate rates for offshore services on the OCS. Sea Robin's newly reclassified "gathering" service is being provided "in connection with" its transportation service under 15 U.S.C. 717c(a), 717d(a), and FERC therefore continues to regulate, under the NGA, Sea Robin's rates for its gathering services. Indeed, petitioners are parties to a settlement with Sea Robin that sets forth the governing rates and terms of service for gathering service set forth in Sea Robin's currently effective tariff. See p. 8, *supra*.

1. a. Petitioners argue (02-1265 Pet. 8-19; 02-1215 Pet. 11-14) that FERC's Orders in this case conflict with this Court's precedents that recognize that "production and gathering" under the NGA are to be narrowly construed. In petitioner ExxonMobil's apparent

view, that principle imposes a "brightline" test (02-1265 Pet. 8, 18-19) in which any movement of gas by a pipeline involves transportation because no such movement involves any "distinct local activity." Pet. 14 (quoting *Michigan-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954)). Petitioner ExxonMobil accordingly believes (Pet. 18 & 25) that Sea Robin's system in its entirety is engaged in transportation because it is akin to a carrier that transports gas "across state lines."

Those contentions ignore the physical reality that Sea Robin's system is *offshore*, where pipelines typically carry raw natural gas over their systems for the purpose of *gathering* the gas so that it may be processed for distribution. Petitioners cite to no decision of any court accepting their view that the function of gathering ceases at the wellhead or production platform operating offshore, and we are aware of none. Indeed, the only courts of appeals to address the contention that all pipeline activity offshore is transportation have rejected it. Thus, the Fifth Circuit in *EP Operating*, 876 F.2d at 48-49, reversed a determination by FERC that gathering was complete at the offshore platform and concluded that an entire 51-mile, 16-inch dual-phase pipeline that connected a floating rig to a fixed platform was engaged in gathering activity. The Fifth Circuit in *Sea Robin*, *supra*, similarly rejected FERC's determination that Sea Robin's system was entirely engaged in transportation.

The decision in *Sea Robin*, 127 F.3d at 370, concluded that "Sea Robin's system resists easy categorization because the logistics of offshore pipelines obscure differences between gathering gas from Gulf platforms and transporting it to the mainland." Because natural gas cannot be processed on open water, pipelines on the OCS carry ("often over a hundred miles") raw gas from

the wellhead to further facilities for processing. *Ibid.* The decision of the D.C. Circuit in this case concurred in that view, and explained that "on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where '[o]nly the most rudimentary separation and dehydration operations' are conducted, to the shore or a point closer to shore, where it can be processed into 'pipeline quality' gas." Pet. App. 5a (quoting *EP Operating*, 876 F.2d at 47, 48). In short, although the terms "production" and "gathering" are "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution," *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 90 (1963), FERC in every case must determine whether the movement of gas through pipelines operating offshore is involved in either gathering or transportation activity.

In this case, FERC applied its settled standards to Sea Robin's particular offshore facilities. As the court of appeals observed:

> It has long been the Commission's view * * * that when gas from separate wells is collected by several lines which converge at a single location in the producing field for delivery into a single line for transportation, the separate lateral lines behind the central point are classified as non-jurisdictional gathering facilities.

Pet. App. 19a. The court found that standard "aptly describes the Sea Robin system." *Ibid.* As the court explained:

> FERC relied on the smaller dimensions of the upstream lines in contrast to the 36-inch Vermilion-Erath line; the 45 laterals feeding into the two upstream arms; the 67 production platforms con-

> nected to the upstream facilities compared with only four downstream; the network configuration of the upstream facilities, and the need for added compression at the Vermilion 149 Station to move gas to shore. All of these physical factors show a meaningful distinction between the facilities upstream and downstream of Vermilion 149 and make it reasonable to define it as the central aggregation point.

Id. at 18a.

Petitioners therefore improperly rely (02-1265 Pet. 15; 02-1215 Pet. 11) on the observation in the dissenting opinion below (see Pet. App. 32a) that at the Vermilion Station, where the upstream arms of the "Y" converge, there is "nothing of any consequence" or "no preparing the gas for the first stages of distribution." FERC's point is that, based on 13 physical factors, the Vermilion Station divides Sea Robin's non-jurisdictional gathering functions from its jurisdictional transportation functions. Thus, FERC permissibly reasoned that "the forks of the 'Y' gathered gas from production platforms at 67 receipt points." *Id.* at 19a.

Petitioner ExxonMobil also errs in arguing (02-1265 Pet. 20-21) that the "crowning flaw" in FERC's orders is that gas from an upstream jurisdictional pipeline, Garden Banks (Pet. App. 109a, SW corner), flows into Sea Robin's reclassified non-jurisdictional gathering lines. As the court of appeals explained, "this suggests that it is the Garden Banks pipeline, rather than Sea Robin, that has been erroneously classified." Pet. App. 23a. Indeed, to hold that FERC was required to classify Sea Robin's entire system as jurisdictional "would create a classic example of circular reasoning," especially given that Garden Banks was originally classified as jurisdictional due to its proximity to the then juris-

dictionally classified Sea Robin system. *Ibid.* Finally, the court of appeals properly concluded that FERC could appropriately "proceed on a case-by-case basis" in determining "how FERC might apply its reformulated primary function test to Garden Banks," as well to other pipelines. *Id.* at 24a.

b. Nothing in the court of appeals' decision conflicts with *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947), or *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), as suggested by petitioner ExxonMobil (02-1265 Pet. 15-16). Neither of those decisions defined what activity constitutes the "gathering" of natural gas, much less suggested how that inquiry should be conducted for facilities and pipelines operating offshore. Rather, the Court in *Interstate Natural Gas* held that *sales of gas for resale* were not exempt from federal regulation as part of "production and gathering," but rather fell within the NGA's grant of jurisdiction over interstate sales for resale. 331 U.S. at 692, 693. *Phillips* likewise did not involve what pipeline activity constitutes gathering, but rather whether the FPC had jurisdiction "over the rate charged by a natural-gas producer and gatherer in the sale in interstate commerce of such gas for resale." 347 U.S. at 674.[2]

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[2] Contrary to petitioner ExxonMobil's suggestion (02-1265 Pet. 9, 17), the court of appeals' decision also does not conflict with *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), which held that federal regulations governing curtailment of natural gas, which would affect state-regulated direct sales, nevertheless fell within the Commission's transportation jurisdiction. *Id.* at 640-642. Nothing in that decision purports to speak to what pipeline activity constitutes "gathering" under the NGA. Moreover, the concern in *Louisiana* was that individual state curtailment programs would inevitably conflict with the federal and other state

c. Petitioner ExxonMobil argues (02-1265 Pet. 16-18) that the court of appeals' decision erroneously held that a rule of strict construction of gathering activities does not apply when services are separately priced, or "unbundled," and accordingly that the decision below conflicts with the decisions of other courts of appeals. That is not correct, and reflects a misunderstanding of the court of appeals' decision. The court of appeals did not hold that unbundled services are not subject to a rule of strict construction. Rather, the court of appeals made the unremarkable statement that "we now live in an unbundled world" in which pipelines like Sea Robin no longer sell gas, but rather provide unbundled services. Pet. App. 21a. As the court noted, unbundling the pipelines' sales service has afforded pipeline customers access to a competitive wellhead market, *ibid.*, as well as to alternative gathering and transportation providers, and will lessen the danger of passing through to consumers an inflated gathering cost as part of a bundled price. The court of appeals therefore properly stated that "the Supreme Court's restrictive definition of 'gathering,' *while clearly relevant*, must be considered in context." *Ibid.* (emphasis added).

Moreover, the court of appeals explained that in the context of "unbundled, *off-shore* pipeline systems, 'the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution,' cannot be as narrowly construed as *on-shore*." Pet. App. 21a-22a (emphasis added) (quoting *Northern Natural Gas*, 372 U.S. at 90). None of the lower court decisions cited by ExxonMobil (Pet. 18) involved the meaning of the term "gathering" in the context of offshore activities.

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programs (*id.* at 632-633)—a concern that does not apply on the OCS.

2. Petitioner ExxonMobil argues (02-1265 Pet. 22-27) that the court of appeals' determination that FERC need not hold abandonment hearings upon reclassification of Sea Robin's system conflicts with Section 7(b) of the NGA, 15 U.S.C. 717f(b), as well as the Tenth Circuit's decision in *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466 (1977). That is not correct. In *Phillips*, *id.* at 467-469, the Tenth Circuit upheld an abandonment requirement where a different company undertook the wholesale service of gas that was previously performed by another company that had obtained a certificate to provide that service under a contract at a lower price.[3]

By contrast, Sea Robin continues to provide not only the same gathering services but also continues to provide those services under FERC's jurisdiction over its rates. As explained above (see p. 8, *supra*), FERC exercises "in connection with" jurisdiction over Sea Robin's gathering rates, and petitioners are parties to a settlement that sets forth the governing rates. Similarly, because Sea Robin has not ceased performing any services subject to FERC's rate regulation, this case is not an appropriate vehicle to determine whether Section 7(b) is triggered when a pipeline ceases performing services that FERC has reclassified.

Petitioner ExxonMobil suggests (Pet. 27 n.7) that Sea Robin may someday discontinue its service "when its transportation contracts expire." Petitioner, however, points to no evidence that Sea Robin is poised to cease service, and there is accordingly no need for the

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[3] Petitioner ExxonMobil's reliance (Pet. 26-27) on FERC's decisions in *Trunkline Gas Co.*, 67 F.E.R.C. ¶ 61,256 (1994), and *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 64 F.E.R.C. ¶ 61,189 (1993), is similarly misplaced. Those decisions addressed the need for abandonment proceedings upon transfer of gathering facilities to another company. 67 F.E.R.C. at 61,859; 64 F.E.R.C. at 62,567.

Court to decide an issue at this highly premature juncture.

3. Petitioners finally argue (02-1215 Pet. 9, 15; 02-1265 Pet. 27-30) that this Court's review is necessary to protect investment in natural gas development and to prevent price gouging of producers by NGA-exempt gatherers. That contention is without merit. FERC's orders in this case have no effect on FERC's jurisdiction to regulate pricing for services provided by Sea Robin's system, and petitioners have entered into a settlement agreement that approves the current gathering rates of Sea Robin that remain within FERC's jurisdiction. Moreover, other than the pipeline system at issue in this case and the one in the Fifth Circuit's *EP Operating* decision in 1996, no other court of appeals has passed upon FERC's reclassification of an offshore pipeline as involved in gathering activities.[4]

Nor is petitioner ExxonMobil correct in characterizing (02-1265 Pet. 29) "[t]he situation [as] particularly grave" because state "regulators have no authority on the OCS" to regulate offshore pipeline activity. Under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, *FERC* has jurisdiction over oil and natural gas pipelines that operate offshore. Under OCSLA, "every permit, license, easement, right-of-way, or other grant of authority for transportation by

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[4] Petitioner ExxonMobil (02-1265 Pet. 30) surmises that litigants will "shop among courts of appeals" in seeking review of any FERC reclassification cases on the OCS. No other court of appeals, however, has accepted petitioners' theory that the activity of gathering offshore ceases at the wellhead or production platform. Indeed, both the D.C. Circuit and the Fifth Circuit (in which Exxon Corporation appeared as an intervener) rejected the assertion that Sea Robin's system in its entirety is devoted to transportation services.

pipeline on or across the [OCS] of oil or gas shall require that the pipeline be operated in accordance with [certain] competitive principles," including that "[t]he pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. 1334(f).[5] FERC has exercised its authority under that Act in order to protect the interests of shippers. *Shell Oil Co.* v. *FERC*, 47 F.3d 1186 (D.C. Cir. 1995); see also *Shell Offshore Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 100 F.E.R.C. ¶ 61,254, at 61,914-61,915 (2002) (asserting jurisdiction over sham gathering affiliate of pipeline), reh'g denied, 103 F.E.R.C. 61,177 (2003). Thus, as FERC has explained, any concerns about a "regulatory gap on the OCS * * * are being addressed by the Commission's exercising its authority under the OCSLA, which gives the Commission sufficient authority over non-NGA jurisdictional pipelines to assure that regulatory goals are achieved." Pet. App. 63a.[6]

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[5] The term "transportation" under the OCSLA is broader than the use of that term under the NGA because OCSLA has no exemption for production and gathering activity. Commission Order 639-A, at 31,689 ("transportation" under the OCSLA "covers everything between a wellhead and shore").

[6] In 2000, FERC adopted regulations under the OCSLA to impose reporting requirements on companies that provide natural gas service on the OCS beyond FERC's jurisdiction under the NGA. 65 Fed. Reg. 20,354 (2000). FERC has appealed a district court order enjoining enforcement of those regulations, *Chevron U.S.A., Inc.*, v. *FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), appeal pending *sub nom. Williams Cos.* v. *FERC*, No. 02-5056 (D.C. Cir). That litigation, however, does not challenge FERC's ability under the OCSLA to adjudicate disputes over discriminatory service on the OCS. *Shell Oil Co.* v. *FERC*, 47 F.3d at 1196-1200.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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